Office Supreme Court, U.S.
JUL 1
ALEXANDER L. STEVAS,

No. 82-1935

Supreme Court of the United States

October Term, 1982

DEMYAN'S HOFBRAU, Inc.,
Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,
Respondent.

Brief for Respondent in Opposition to Petition for a Writ of *Certiorari*

Herbert P. Polk
Attorney for Respondent
c/o Whitman & Ransom
Attorneys at Law
522 Fifth Avenue
New York, NY 10036
(212) 575-5800

John Condon Young,
Of Counsel

Table of Contents.

	Page
Statement of the Case	2
Argument	4
Conclusion	9
Appendix	10

TABLE OF AUTHORITIES

Ruby v. American Airlines, Inc., 329 F. 2d 11 (2 Cir. 1964), *vacated on other grounds*, 381 U. S. 277 (1965)	5
Fed. R. Civ. P. 52(a), 28 U. S. Code	1, 4, 5
Rule 17.1(a) of the Rules of the Supreme Court	2, 4, 5
Rule 49.2 of the Rules of the Supreme Court	2, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982.

No. 82-1935

DEMYAN'S HOFBRAU, INC.,

Petitioner,

vs.

INA UNDERWRITERS INSURANCE CO.,

Respondent.

Brief in Opposition to Petition for Writ of *Certiorari.*

Table of Authorities.

Federal Rules of Civil Procedure
28 U. S. Code

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury . . ., the court shall find the facts specially. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact . . . appear therein.

Rules of the Supreme Court

Rule 17 CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered.

(a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 49 INTEREST AND DAMAGES

* * *

.2. When . . . [a] petition for writ of certiorari is frivolous, the Court may award . . . the respondent appropriate damages.

Statement of the Case.

The respondent ("INA")* submits this brief in opposition to the application by the Petitioner ("Demyan's") for a writ of *certiorari* to the Second Circuit which has both affirmed the judgment of the District Court (Milton Pollack, D. J.) and denied Demyan's both a rehearing and *en banc* consideration of its appeal.

*The respondent is a subsidiary of Cigna Corp., whose corporate affiliates are listed in the Appendix to this Brief.

The issues at the trial of this diversity action between a New York citizen-policyholder and a Pennsylvania citizen-fire insurer included the factual question whether Demyan's had set or procured the fire which damaged its restaurant on January 8, 1980. Judge Pollack heard the evidence on four trial days within a ten-day span and, as soon as both parties had rested,* ruled from the bench as to one of the constituent issues of that arson defense, *i.e.*, whether the evidence established that the fire was incendiary in origin. Judge Pollack ruled that it was.

His statement on that issue follows:

> It has been clearly proved by the defendant and not contradicted by any acceptable evidence worthy of belief, that the fire on January 8, 1980 was of incendiary, non-accidental origin. There were two and perhaps three points of origin of fire, separate and separated, which were caused in each location by a supplied flammable liquid or accelerant to the premises. There was no evidence which is credited by the court of any other cause for the outbreak of the fires. The location of the points of origin and the inverted cones and the pooling make it clear and convincing beyond peradventure of doubt that arson was the cause at each of the two and perhaps three separate and separated portions of the insured premises. 542 F. Supp. 1385f (S.D.N.Y. 1982).

---

*Demyan's seems to criticize Judge Pollack for making his finding of incendiarism "(i)mmediately upon the conclusion of the trial . . .and without benefit of a trial transcript" (Petition, p. 4). Were the court's findings spread on the record on August 2, 1983, rather than on June 2, 1982, the District Judge could not be faulted for stating "findings of fact . . . orally and . . . in open court following the close of the evidence," to quote the change in the penultimate sentence of Rule 52(a), effective August 1, 1983.

In the first of its "Questions Presented" to the Court, urging error under Rule 52(a), Demyan's challenges the propriety of Judge Pollack's ruling when he did, argues that he should have spelled out in greater detail his evaluation of the witnesses and the weight he ascribed to the testimony of each, and attempts to make a "due process" claim which is said to have arisen from the perceived infirmity of Judge Pollack's ruling, a "due process" claim Demyan's never made to either the District or the Circuit Court. In the second of its Questions Demyan's seeks to raise to the dignity of an appealable issue the Circuit Court's phrasing of its reasons for affirming the judgment of dismissal. Both of these first two Questions seem to invoke the Court's *certiorari* jurisdiction under the "power of supervision" clauses found in the last third of Rule 17.1(a). Demyan's does not appear to invoke any other aspect of Rule 17 or to advance any other "special and important reasons" for the Court's exercising its discretion to issue the requested writ. The third of Demyan's Questions conjures up a second "due process" argument that neither is realistic now nor was when Demyan's first raised it on its motion in the Second Circuit for rehearing or *en banc* consideration.

As in the Circuit Court, so here, Demyan's in effect concedes that Judge Pollack correctly found that Demyan's had both opportunity and motive to have set its property afire.

Argument.

As to Demyan's first Question Presented:

In the second paragraph of its "Argument" Demyan's admits that

> "this is *not* the case where (a lower court's factual) determinations lack evidentiary support or are against the weight of the credible evidence" (Demyan's Petition for *certiorari,* p. 6; the emphasis is Demyan's).

It is clear, therefore, that Demyan's seeks merely to have the Court exercise its Rule 17.1(a) "power of supervision" to examine Judge Pollack's findings and classify them as deficient in form under Rule 52(a). Judge Pollack came to the right conclusion but Demyan's faults his writing style.

Judge Pollack need not have written out in fine detail his views as to each exhibit he received in evidence or each witness he saw and heard. Indeed, as Circuit Judge Medina wrote for the Court in the *Ruby* case which Demyan's has cited in its Petition:

> [W]here the testimonial evidence is conflicting and the trial judge saw and heard the witnesses as they gave their testimony, . . . a finding of fact by a District Judge in a non-jury case must stand if there is substantial evidence to support it; and it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit the testimony or part of the testimony of each witness.

Ruby v. American Airlines, Inc., 329 F. 2d 11, 14 (2d Cir. 1964), *vacated on other grounds* 381 U. S. 277 (1965)

Certain facts, some omitted from, others incorrectly recited in Demyan's Petition, help to explain Judge Pollack's determination, and the Second Circuit's, and Demyan's admission that their determinations enjoy evidentiary support.

Unmentioned by Demyan's is Fireman Maiello, "the first of the firemen" to arrive at the scene (*id.*, p. 12a). Mr. Maiello preceded Batallion Chief Gallagher to the fire by several minutes and forced open several locked doors to give the other firefighters access to the flames within the building. One such was the door to the "utility room" (as John Demyan referred to it on the witness stand) which housed air-conditioning equipment. The record supports the inference that the first fire fought was at that "utility room" door. Its immediate extinguishment would amply explain Mr. Gallagher's failure to notice flames at that doorway as he followed his personnel into the building, when he eventually did so. Mr. Gallagher neither saw the flames there that night nor heard Mr. Maiello describe them at trial. Judge Pollack had the advantage of seeing and hearing Mr. Maiello, however; and his findings enjoy the support of Mr. Maiello's evidence.

Judge Pollack also saw and heard Fire Marshal Kopp describe what he saw, did, and concluded on his two visits to the fire scene, the first the very morning of the fire. He arrived while firefighting operations were still in progress—not, as Demyan's Petition reads and implies, merely "one day thereafter" (*id.*, p. 8). Mr. Kopp described in his testimony both the "pooling" of the flammable liquid and an "inverted cone" that he saw at the entrance to that "utility room," one of the "two and perhaps three points of origin of fire" which Judge Pollack found

Demyan's belated and spurious "due process" claim aside, it would be an exercise in futility for the Court to dignify the first of Demyan's Questions by issuing a writ whose most favorable result from Demyan's standpoint would be remand to the District Court so that Judge Pollack might give a more explicit statement of his reasons for finding that the fire was set—as Demyan's concedes the evidence entitled him to find.

As to Demyan's second Question Presented:

On his direct examination of Mr. Gallagher, Demyan's trial counsel (and attorney in this Court) received an answer which included the information that on entering the building Mr. Gallagher found "the visibility was almost zero." The question which elicited that answer is this:

> "Q. Was there any heavy smoke coming from below and in back of you?"

If the Court (or Judge Pollack) had that question unadorned, the context of the answer might be clouded. Without interruption, however, Demyan's counsel clarified his question for the witness, for the trier of fact, and for the reviewing courts:

> "Q. I am referring when I ask you that question, to the area immediately adjacent to the right of the entrance that you entered, an area that's been described during the course of this trial as exposure two."*

---

*"Exposure two" is the New York City Fire Department's terminology for the left side of Demyan's building as viewed from Van Duzer Street which it faced.

His next two questions also dealt with smoke conditions "immediately adjacent to (that) . . . entrance," before Demyan's counsel inquired about conditions farther within the building, asking:

"Q. And how about up above?"

The "exposure two" entrance is precisely where Mr. Maiello indicated the first firefighting occurred, precisely where Mr. Kopp found "pooling" and an "inverted cone." At that entrance Mr. Gallagher found "the visibility was almost zero." The Second Circuit was perfectly correct, therefore, in commenting as it did "that visibility within the building was 'almost zero' " (*id.*, p. 5a). The trial record, which page 11 of its Petition correctly quotes, the emphasis aside, simply does not justify Demyan's labored argument that the Second Circuit erred by characterizing the evidence as it did in making that comment.

Although Demyan's "now contends," on page 15 of its Petition, that on cross-examination Mr. Gallagher gave an answer to a hypothetical question which lacked an evidentiary basis, Demyan's made no such contention in either its brief to the Second Circuit or its motion for reargument or *en banc* consideration.

As to Demyan's third Question Presented:

Demyan's concludes its Argument by reference to "an overriding constitutional issue of first impression." This "issue" first appeared in Demyan's motion asking the Second Circuit for a rehearing or *en banc* consideration.

Apart from any issue of waiver, there is simply nothing in the New York law of judgments or the New York law of evidence to lend the least support to the suggestions that Demyan's (or either of its principals on the day of the fire) faces any criminal penalty based on the judgment in this action or that that judgment would be admissible as part of the prosecution's *prima facie* case on the trial of some indictment. Equally untrue is Demyan's contention that the People of the State of New York would be estopped from prosecuting were Demyan's to prevail in this action.

There is, finally, no warrant for Demyan's suggesting that the judgment in this action might visit "a serious economic impact of a negative nature . . . (because) of the implications and aspersions extant within the business and social community in which this matter took place" (*id.*, p. 19). It is equally probable, perhaps more so, that that "community" would react adversely to John Demyan's 1981 conviction for attempting to defraud the U.S. Small Business Administration (*id.*, p. 17a).

Conclusion.

The Court should deny Demyan's petition for a writ of *certiorari*, declare it a frivolous application, and award INA appropriate damages pursuant to Rule 49.2.

Respectfully submitted,

HERBERT P. POLK
Attorney for Respondent

JOHN CONDON YOUNG,
Of Counsel

APPENDIX.

The Respondent's affiliated corporations are these:

Colina Ins Co Ltd
Bimeh Shargh Ins Co.—20% Interest
Investors Life Ins Co of N Amer
Ins Co. of N. Amer. (U.K.) Ltd
Comp De Seguros Cruz Azulsa

New Enterprise Associates L.P.
Bankard Club Inc
Compar Facilities, Inc (of Pa)
Compar Facilities, Inc (of Wash)
INA U.K. Holdings, Ltd.

INA International Corporation
Lime Street Properties, Ltd.
Logan Land Company, Inc.
I. N. A. Insurance Company Ltd
Bankers Standard Fire/Marine Co

Bankers Standrd Ins Co
Datamann Inc.
Educators Life Ins Co
Educators Marketing Serv Corp
Well-Care, Incorporated

Teachers Ins. Underwriters
Extra Cover Ins Agency, Inc.
Grp for Internat Study & Eval
INA Community Services, Inc.
INA Insurance Services, Inc.

INA International Insurance Co.
INA Internat. Ins Managers, Ltd
INA Life Ins Co. of Canada
INA Underwriting Agency Ltd
Ins. Co. of N. Amer. (Australia)

Ins Co of N Amer (Ireland) Ltd
Ins Co of N Amer (New Zealand)
Maritime-INA Gen. Ins. Co. Ltd.
J. D. Robb & Assoc Ins Brokerage
Societe Civile Immobiliere Tur

Indemnity Ins Co of North Amer
Public Employees Ins. Service
Stellate, Inc.—Prod Liab
INA Healthplan of California
Companhia Colina De Seguros

INA Health Plan of Arizona Inc.
INA Service Company
Gatx Insurance Co.
INA Construction Risk Inc INACO
INAMIC Ltd.

INA Re Exchange Investors Inc
INA Bond Facilities, Inc.
INA Loss Control Services, Inc.
INA Universal Corp
INA Internat. Investors, Ltd

Internat. Safety Academy, Inc.
INA Title
INA Title Ins Co
F. S. Agency Inc
INA Diversified Services Inc.

Internat. Surplus Adjusting Ser
INA Forsikrings Aktieselskab
Extra Cover, Inc
INA Health Plan, Inc.
Surplus Ins Brokers of N. Amer

INA Healthplan of Texas, Inc
MJ Brock-Sons/Orange Cnty Resd
Compagnie D'Assurance Colina Sa
Contabilidad Mecanizada Sa
Educators Fund Mgt Corp

INA Montgomery Properties Inc.
INA Conference Facilities Inc.
INA Trading Corp.
INAPRO, Inc.
Insurance Company of Africa

La Nouvelle, S.A.
L. S. Holding Company
Petroleum Insurance Inc.
Philadelphia Investment Corp.
The 1792 Company

Ross Loos Medical Group
INA Standard
Standard Associates
INA Healthplan of Tuscan, Inc.
INA Healthplan of Washington

INA Health Plan of Florida
Lewis & Norwood Inc.
Illinois Union Ins Co
Master Life Insurance Company
Reinsurance Consultants Ltd

Cigna Corp Services Div
Cigna Organizational Dev Div
Cigna Financial Div
Cigna Human Resources Div
Cigna Legal Div

Cigna Staff (Per, Fin, Legal)
Cigna Outside Money Mgmt
C. G. Investment Mgmt Co
Cigna Corporate Accounts
Cigna Private Securities

Cigna Realty Advisor Inc
CONGEN Properties Inc
Cigna Special Investments
Cigna Howard Research & Div Inc
Cigna Affiliated Bus Grp Stf

Cigna International Dev
Arizona Health Plan Inc
Aetna Insurance Company
Cravens, Dargen & Co
Cigna C. G. Grp Ins Div

Cigna Grp Pension & Reins Div
C. G. Pension Services Inc
Cigna Individual Fin Svcs Div
Cigna Mgmt Resources Inc
Cigna Securities Inc.

Cigna Empl. Ben & Fin Svcs Grp Stf
Conn Gen Life Ins Co
Connecticut General Corp
Conn Gen Life & Cas Ins Co
Conn Gen Fire & Cas Ins Co

Aetna Fire Underwriters Ins Co
Aetna Ins Co of the Midwest
Aetna Reinsurance Company
American Lloyds Insurance Co
Atalfa Inc

AFIA Finance Corporation
C.G. Medical Programs Inc
Centry Indemnity Company
Terra Nova Ins Co Ltd
Technical Risk Mgmt Serv Inc

Rain & Hail Ins Service Inc
Assoc. & Consumer Mktg Svcs Corp
Atlantic Employers Ins Co
EFMC Services Corp
INA Commercial Finance

INA Community Serv of Ohio
INA Employers Ins Co
INA Properties of Delaware, Inc
INA Properties Processing Ctr Inc
INA Sudamericana S.A.

Ins Co of N Amer (Greece)
Int'l Survey & Adjustment Co Ltd
Inversiones INA Ltd
La Henin Vie
Latina Holdings Ltd

Lincoln Union Syndicate Inc
Montgomery & Collins Int'l
Railroad Ins Brokers Inc
Reaseguros Inacap S.A.
Senior Mktg Ins Serv Corp

All Funds Management Corp
C. G. Trust Company
Conn Gen Mgmt Resources Inc
Conn Gen Pension Svcs Inc
INA Benefit Serv Co

INA Standard Inc
C. G. Equity Ventures Inc
Congen Realty Advisory Co
Parkway Mangement Corp
Philadelphia Drilling Company

Philadelphia Eagle Drilling Co
Philadelphia Falcon Drilling Co
Philadelphia Jefferson Corp
Realconn, Inc
Reston Office—1 Inc.

Scottsdale Exec Centre Corp
2525 E Arizona Biltmore Circle
Blyth Eastman Dillon Cptl Mkts
Eastman & Dillon Int'l Holdings
Bundoora Private Hosp Pty Ltd

INA Health Care Group Inc
INA Eagle Lodge Properties Inc
Cigna Associates, Inc
Insurance Co. of North America
Allied Ins Company

INA of Texas
Pacific Employers Insurance Co.
Life Ins. Co. of North America
INA Life Ins. Co. of New York
Compagnie Financiere INA

Compagnie Nouvelle D'Assurance
Continental Ass Co London Ltd
INA International Holdings Ltd
INA International Ins Co. Ltd.
INA Overseas Properties Ltd

Hai, Inc.
INA Corporation
INA Security Corporation
Gamma Inac, Inc.
Inax Underwriters Agency Inc.

Inax Inc
INA Capital Management Corp.
Horace Mann Educators Corp
Horace Mann Insurance Co
Horace Mann Life Ins Co

Horace Mann Investors, Inc
MJ Brock—Sons/L. A. Residentl
Teachers Insurance Company
Agri Ins Underwriter Inc
MJ Brock—Sons/Sacamento Resd

MJ Brock & Sons-San Fran Resd
Public Employees Insurance Co
MJ Brock—Sons/Colorado Resd
MJ Brock—Sons/Charter Oaks
Hosp Affilities, Internat Inc

INA Capital Advisors, Inc.
INA Coast to Coast Corp
Coast to Coast Corp
Seguros Colina, S.A.
Alic Inc

Allied Insurance Co.
INA County Mutual Insurance Co
JTX Club
Membership Assistance Corp
Insuror Management Company

INA Farm Center, Inc.
The Data Corporation
INA Financial Corporation
INA Insurance Co of Canada
Recovery Serv. International

California Union Ins Co
INA Underwriters Ins. Co.
Montgomery & Collins Inc
Montgomery & Collins—Pennsylvania
Montgomery & Collins—Texas

Montgomery & Collins—Thailand
Montgomery & Collins—Dallas
Montgomery & Collins—Florida
Montgomery & Collins—Illinois
Montgomery & Collins—New Jersey

Montgomery & Collins—Massachusetts
INA Properties, Inc
Richgart Inc
R & I Joint Venture
Commercial Surplus Fac Inc

INA Properties of Colorado Inc
INA Reinsurance Company, S.A.
Eagle Lodge
INA Foundation
INA Reinsurance Co. (U.K.) Ltd

INA Special Risk Facilities Inc
Lawrence Systems, Inc
Lawrence Warehouse Company
Lawrence Business Credit Inc
Lawrence Collateral Svcs Ltd

Lawrence Financial, Inc
Lawrence Int'l Holding B.V.
Lawrence Systems, Inc of Mass
Inacan Holdings Ltd.
Alaska Pacific Assurance Co

INACAP, S.A.
INACAP Reasegurds, S.A.
INAMAR, Ltd.
Stellate (Star Sprinkler)
INAMEX S.A.

INAVEN C.A.
Mealane Corp—Prod Liab
Mealane Corp of California
Safety First Products Canada, Ltd
Inter Trust Insurance Company

Interamerican Life Ins Co S.A.
International Service Corp.
Internat. Rehabilitation Assoc.
Int'l Rehab Asso Pty Ltd
Marketdyne International, Inc

Marketdyne of Canada Ltd
INA Insurance Co. of Illinois
INA Life Insurance Company
INA Reinsurance Company
ESIS, Inc.

Robert F Coleman Inc.
Diversified Ins Agency Inc
National Employee Benefit Corp
National Health Care Corp.
Air Balance Inc

Self-Insurers Management Corp
E. J. McConnell & Assoc., Ltd.
MJ Brock & Sons
Northern Woods Products Assoc.
Norton Life Insurance Company

Pan Arabian Insurance Co., Ltd.
INA Insurance Company of Ohio
Premium Recovery Serv Internat.
Project Finance Corporation
INAC Corp.

INAC Corp of California
MJ Brock-Sons/General Contract